Petition

81-1722

Office - Supreme Court, U.S.
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NO._____

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROSALIND A. DRAPER,

PETITIONER

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROSALIND A. DRAPER,
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QUESTIONS PRESENTED FOR REVIEW

I. Did the U.S. Court of Appeals for the Eighth Circuit review case for Federal violations and improprieties which were inconsistent with the petitioner's Civil and Constitutional Rights?

Petitioner says no.

II. Was the reduction-in-force used improperly to dismiss the injured employee from the position of Construction Analyst?

Petitioner says yes.

III. Did the Department of Housing and Urban Development and the other authorized agencies conspire to obstruct justice?

Petitioner says yes.

IV. Has the petitioner's Civil Rights and Constitutional Rights been violated?

Petitioner says yes.

V. Has sexual, physical, and racial discrimination been practiced against the petitioner?

The Petitioner says yes.

VI. Has the health of the injured employee been safe-guarded?

Petitioner says No.

VII. Did the DHUD act in "Good Faith" by forcing the injured employee with a handicapping condition to return to field work?

Petitioner says No.

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROSALIND A. DRAPER,
PETITIONER

V.

UNITED STATES OF AMERICA
RESPONDENT

Petition for Writ of Certiorari To
The United States Court of Appeals
For the Eigth Circuit

BRIEF FOR PETITIONER

Petitioner, Rosalind A. Draper, respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Eigth Circuit entered on Dec. 30, 1981.

OPINION BELOW

The decision of the United States Court of Appeals to affirm the decision of the Merit Systems Protection Board was without considering the fact that the Petitioner's Civil Rights, Constitutional Rights had been violated and also that Federal Laws and Regulations have been violated according to P.L. 95-454 Oct. 13, 1978.

JURISDICTION

The order affirming the Court's decision was submitted on December 23, 1981, and filed December 30, 1981, and the jurisdiction is invoked under 42 USC 2000e-16, 717 Civil Rights Act of 1964 and 5 USC 2301 and 5 USC 2302.

STATUTES INVOLVED

5 U.S.C.	2301 and 2302
5 U.S.C.	3501 through 3504
29 U.S.C.	206(d)
42 U.S.C.	2000e-16) Section 717 of the Civil Rights Act of 1964
42 U.S.C.	1985 and 1986

Federal Personnel Manual 351

STATEMENT OF THE CASE

As a result of a reduction-in-force action by the Department of Housing and Urban Development June 1980, the petitioner was dismissed from her position as a Construction Analyst. This reduction-in-force was implemented improperly. The petitioner filed an appeal to the Merit Systems Protection Board on February 10, 1981. The decision rendered by the presidino officer was that the petition was filed untimely. On April 16, 1981, the petitioner filed a petition for rewiew of the initial decision which was also affirmed. This final order issued on June 30, 1981, informed appellant of her right to seek judicial review of the Board's action as specified in 5 USC 7703 in the appropriate court. Under this section on page 330 of the United States Codes, 5 USc 7703(b)(2) states, cases of dis-

crimination subject to the provisions of section 7702 of this title (5 USC 7702) shall be filed under section 717 (c) of the Civil Rights Act of 1964 (42 USC 2000-e 16). This final order did not inform petitioner of her right to file under section. The petitioner had made charges of discrimination in her initial appeal, but was not made aware by the Merit Systems Protection Board that cases of discrimination should be filed under section 5 USC 7702. On July 28, 1981, a petition was filed in the United States Court of Appeals for the Eighth Circuit. The decision of the Board was again affirmed.

REASONS FOR ALLOWING THE WRIT

I.

The United States Eighth Circuit Court of Appeals affirmed the decision of the Merit Systems Protection Board, based upon an interpretation of the language of the Civil Service Reform Act of 1978, 5 USC 7701. The Civil Service Reform Act of 1978 also has other provisions which do protect employees and their rights. The Department of Housing and Urban Development has violated PL 95-454 Oct. 13, 1978. The following statutes have been violated by DHUD.

5 USC 2301 (b) (2) which states all employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

Although,my position as a Construction Analyst was abolished, a white male, GS-11, was trained to do the petitioner's abolished duties. The other male Construction Analysts who were in a lower sub-group were not affected by the reduction-in-force even though according to RIF procedures, those persons at the bottom of a retention list should be the first to be dismissed. The petitioner did not receive fair and equitable treatment and protection by law.

5 USC 2302 (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

(1) discriminate for or against any employee or applicant for employment-

(a) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(c) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards

Act of 1938 (29 USC 206(d);

(d) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 USC 791).

When the petitioner was removed illegally from her abolished position, racial and sexual discrimination was practiced against her because she was the only black female Construction Analyst in the Architectural Branch. She had more seniority than her male counter-parts, who were also in a lower sub-group. She was discriminated against because she has a handicapping condition which has been documented and proven by medical reports and physical examinations.

The Department of Housing and Urban Development, Office of Worker' Compensation Programs, Office of Personnel Management, and the Merit Systems Protection Board have violated 42 U.S.C. 1985 (a), Conspiracy to interfere with civil rights, 42 USC 1985 (b) obstructing justice and 42 USC 1985 (c) depriving persons of rights

or privileges. 42 USC 1986, Action for neglect to prevent , states every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. All of the governmental bodies had been provided all supportive documentation needed for those parties in power to either force action or to bring an equitable or proper solution, knowing

that they misdirected the petitioner by violating Federal Rules and Regulations and also Federal Statutes. This action on their behalf have caused untimely delays and sufferings. The question is raised, which issue is more timely or equitable--the violation of 5 USC 2302 (b) (1) (a) (c) (d), 42 USC 1985 (a) (b) (c) 42 USC 1986 and Section 717 of the Civil Rights Act of 1964 (42 USC 2000e -16) or the intentional misdirection which precipitated the judgment of the lower court?

The court has stated in their argument that the agency action may be more accurately termed a transfer of assignment rather than a reduction in grade or pay. This was not an issue. The memo dated 4-29-80 to the petitioner classified the action taken by the Department of Housing and Urban Development a Reduction -in-force. As per Chapter 351 of the Federal Personnel Manual, Subchapter 2, reduction-in-force regulations apply only when there is a release from a

competitive level.

The action taken by the Department of Housing and Development should more accurately be termed a reorganization according to FPM 351, subchapter 2-6. A reorganization occurs when management at any level adds to, takes from, or redistributes the functions or duties of one or more positions. When a reorganization is the cause of a separation, furlough for more than 30 days, change to a lower grade, or reassignment involving displacement, the reduction-in-force procedures must be followed. Given a reorganization which has created a surplus in a competitive level, the agency's election to use the reduction-in-force procedure to relieve the surplus requires the issuance of a reduction in-force notice to the employee within reach on the retention register, which was later produced after the petitioner had filed a complaint, shows three male employees in sub-group II. The petitioner was in Sub-

group I. Section 3502 of Title 5 USC sets up four basic factors to which effect must be given: Tenure, veteran preference, length of service, and performance rating. Although, the petitioner was not the one to be reached on the retention register, the Department of Housing and Urban Development chose to do so in spite of the federal regulations regarding reduction-in-force procedures.

Federal Personnel Manual 351, 2-8 states the authority of the Office of Personnel Management. Section 3501 through 3504 of Title 5 USC establishes the general outlines to be followed in reduction-in-force. Ordinarily it is through the appellate process that OPM exercises its general enforcement authority, determining whether the agency has complied with the technical provisions of the regulations and requiring correction of violations. Paragraph 2-8 further states, on occasion,

however something more than mere technical compliance may be necessary to protect the spirit and intent of the regulations and the equities of employees. Therefore,when it seems appropriate to do so, OPM will examine an agency's plans and preparations for reduction-in-force. OPM will require corrective action at any stage, before or after actions are effected, whether or not appeals have been filed, when necessary to prevent or correct violations of employee rights or equities. The OPM was aware of the violation of the reduction-in-force procedure, but they also chose not to intervene or to do what is just. Had OPM reviewed the agency's plans and preparations for the RIF, they would have been able to determine that the Department was trying to release me from their employ because I have a handicapping condition as a result of an on-the-job injury sustained 11-14-1974. Under reduction-in-force pro-

cedures, an employee who is released from their competitive area should have been entitled to bump or retreat rights, which would have allowed the petitioner an opportunity to obtain a position which did not require field work, which aggravates her back injury.

CONCLUSION

The United States Court of Appeals for the Eighth Circuit has based its decision solely on one aspect of the Civil Service Reform Act of 1978, disregarding the fact that the petitioner has Civil and Constitutional Rights which have been violated. The governmental agencies who had authority to enforce Federal Rules, Regulations and guidelines for protecting and safeguarding the Civil Rights, have not carried out their responsibility or upheld the Constitution of the United States of America.

Since the initial onset of the petitioner's problems began, no agency or enforcement officials would take the time nor extend to the petitioner the justice she has been deprived of.

All the allegations set forth in the petitioner's original complaint to the

Merit Systems Protection Board are thoroughly documented and factual and are on record. These government agencies had the facts which they knew to be true and could justify the petitioner's allegations, which is all they needed to perpetrate justice.

Because the Department of Housing and Urban Development has not acted in "Good Faith" concerning the unusual situation they have caused me to be placed in since the on-the-job injuryof Nov. 11-1974, and because this case is an issue of morality, honesty and ethics, I am asking the United States Supreme Court to kindly review my case and reverse the decision rendered by the U. S. Court of Appeals for the Eighth Circuit. I am prayerfully asking that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

BY Rosalind A. Draper

ROSALIND A. DRAPER
Counsel and Petitioner
300 Mansion House 915 C
St. Louis, Mo. 63102
314-231-3472

AFFIDAVIT OF SERVICE

Personally appeared before me, the undersigned authority in and for the State of Missouri, the within named Rosalind A. Draper, who after being duly sworn by me stated on oath that three true copies of the petition have been mailed by certified mail to Counsel for the Respondent, the Solicitor General, Dept. of Justice, Washington, D.C. 20530, on the 15th day of March, 1982.

Rosalind A. Draper

Rosalind A. Draper

SWORN TO and subscribed before me on this the 15th day of March, 1982.

NOTARY PUBLIC

My Commission Expires:

2-16-85

MARY ANN GALLAGHER
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES FEB. 16, 1985
CITY OF ST. LOUIS

Appendix

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OCTOBER TERM, 1981

ROSALIND A. DRAPER,

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VERSUS

MERIT SYSTEMS PROTECTION BOARD

RESPONDENT

APPENDIX to PETITION TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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APPENDIX

JUDGMENT TO BE REVIEWED:

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1778

ROSALIND A. DRAPER
Petitioner,

VS.

MERIT SYSTEMS PROTECTION BOARD
Respondent

Appeal from the United States

District Court for the

Eastern District of Missouri

(Dec. 30, 1981)

Before HEANEY, HENLEY and McMILLAN, Circuit Judges

AFFIRMED

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROSALIND A. DRAPER

V.

DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on March 19,1981, and finding that it does not meet the criteria for review set forth at 5 CFR 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial

review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

June 30, 1981
(date)

Robert E. Taylor
Secretary

Washington, D.C.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. _____

ROSALIND A. DRAPER,
Petitioner,

VS.

MERIT SYSTEMS PROTECTION BOARD,
Respondent,

Appeal from petition for Review of Order of Merit Systems Protection Board.

(December 30, 1981)

Before HEANEY, HENLEY and McMILLAN, Circuit Judges.

O R D E R

Rosalind Draper asks this court to review a decision of the Merit Systems Protection Board dismissing her appeal from an action of her employer, the Regional Director of Housing and Urban Development, reassigning her pursuant

to a reduction in force. The Board dismissed this appeal because it was untimely. It dismissed other allegations on the grounds that it was without jurisdiction to hear them.

After a careful consideration of the brief and records, we affirm the decision of the Board for the reasons set forth in its opinion.

A true copy.

Robert D. St.Vrain

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

With regard to other matters raised in appellant's petition, such as her agency's failure to promote her, the Department of Labor's adverse decision concerning her alleged on-the-job injury, and her allegations of discrimination against her because of sex and physical handicap, the threshold question which must be decided is whether or not any of the foregoing mentioned actions are within the Boards's appellate jurisdiction. 5 U.S.C. 7701(a) states an employee may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. 5 C.F.R. 1201.3 delineates the types of cases over which the Board exercises its juriscition. An agency's action in not promoting an employee is not covered. Neither is there any law, rule, or regulation which allows an employee to

appeal a decision rendered by the U.S. Department of Labor, Employees' Compensation Appeals Board, to the Merit Systems Protection Board. Finally, an unfair labor practice charge is properly resolved by the Federal Labor Relations Authority and not by the Merit Systems Protection Board.

In conclusion, in light of the foregoing analysis, I find that appellant's appeals of various personnel matters as delineated in this analysis are not within the appellate jurisdiction of the Merit Systems Protection Board.

In summary, I find that appellant's appeal of her reassignment as a result of a reduction-in-force action effective at the end of June, 1980, is untimely and therefore will not be accepted for adjudication. Appellant's allegations of prohibited discrimination as they relate to the reduction-in-force will not be considered because her appeal of that action is untimely. Her allegations of

prohibited discrimination which relate to the other matters which she wanted the Board to review also cannot be considered because the actions appealed are not within the Board's appellate jurisdiction (Lancaster v. Social Security Administration, 2 MSPB 206 (1980)).

DECISION

Based on the foregoing analysis and the evidence of record, appellant's appeal of the reduction-in-force action which was effected against her in June, 1980, is dismissed as untimely. Moreover, appellant's appeal of her agency's failure to promote her, the U.S. Department of Labor's adverse decision concerning her alleged on-the-job injury, and her appeal from a decision concerning an unfair labor practice charge filed with the Federal Labor Relations authority, are also dismissed because these matters are not within the Board's appellate jurisdiction.

A reviewing court should defer to the statutory and regulatory interpretations of an administrative agency unless that interpretation is unreasonable or plainly erroneous.

The scope of a court's review of the decisions of administrative agencies was discussed by the Supreme Court in Udall v. Tallman, 380 U.S. 1, reh. denied, 380 U.S. 989 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. Id. at 16.

See also Gladstone REaltors V. Village of Bellwood, 441 U.S. 91 (1979); Van Wyk V. Berqland, 570 F.2d 701 (8th Cir. 1978).

The scope of judicial review of decisions by the Merit System Protection

Board is limited to ensuring that required procedures have been followed and that the action taken was not arbitrary or capricious. That the agency decisions have a rational basis in law is the test for such review. Grasso v. Internal Revenue Service, 657 F.2d 224 (8th Cir., 1981); Hurley V. United States, 575 F.2d 792, 793 (10th Cir., 1978); Wroblaski v. Hampton, 528 F.2d 852, 853 (7th Cir., 1976).

Scope of review of a Merit Systems Protection Board decision was discussed in Hurley v. United States, supra. There the court stated:

It is not our prerogative to substitute our judgment for that of the Board. The decision of the Board is to be given nearly every presumption of validity that the law presently grants to any administrative adjudication... The Board's interpretation of its own

rules and regulations must be sustained and applied as controlling law unless that interpretation is plainly erroneous or inconsistent with regulations (cit). Id. at 793.

In the instant case, the Board, in finding that appellant's petition for review was not timely filed and failed to present new and material evidence, correctly interpreted the language of the Civil Service Reform Act of 1978, 5 U.S.C. 7701, and its implementing regulations in 5 C.F.R. 1201.22(b) and 1201.115.

CONCLUSION

For the foregoing reasons, the decision of the Merit Systems Protection Board should be affirmed.

AFFIDAVIT OF SERVICE

Personally appeared before me, the undersigned authority in and for the State of Missouri, the within named Rosalind A. Draper, who after being duly sworn by me, stated on oath that three true copies of the petition have been mailed by certified mail to Counsel for the Respondent, the Solicitor General, Dept. of Justice, Washington, D.C. 20530, on the 24th day of March, 1982.

Rosalind A. Draper

Rosalind A. Draper

SWORN TO and subscribed before me on this the 24TH day of March, 1982

NOTARY PUBLIC

My Commission Expires:

JOHN MICHOLEVICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES SEPT. 10, 1982
ST. LOUIS COUNTY